

Employer Status Determination
Paladin Strategies, Ltd.

This is the decision of the Railroad Retirement Board regarding the status of Paladin Strategies, Ltd. (Paladin), as an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. The following information was provided by Mr. Harry A. Joseph, Jr., President of Paladin.

Paladin was incorporated in April 1996 and entered into a contract with Grand Trunk Western Railroad (GTWR) to provide services by independent contractors for GTWR. Although Mr. Joseph states that the contract was entered into in April 1996, it is dated March 25, 1996. Mr. Joseph also states that Paladin is a privately-held company with no employees and no railroad owns stock in Paladin and no owners or officers of Paladin own any stock in GTWR. Paladin has provided the services of three individuals to GTWR: Mr. Joseph, Mr. Donald Bates, and Mr. Richard J. O'Brien. Although Paladin currently has only the contract with GTWR, Mr. Joseph states that Paladin

will shortly enter into an agreement with Empco, under which Paladin will provide general contractor services * * * to make available individual contractors with expertise in the specific area of labor relations. Empco is an employee leasing company based in Troy, Michigan which provides various types of employment services to a wide variety of clients. Paladin is also finalizing an arrangement with Brass Forgings, Inc., a brass manufacturer in Ferndale, Michigan, for the provision of safety expertise through our individual independent contractors.

Paladin is also negotiating an agreement with a rail carrier unrelated to GTWR.

The contract between GTWR and Paladin provides that GTWR is to pay Paladin \$8,000, and \$75.00 per hour for each hour worked by the President of Paladin. It is unclear whether this hourly compensation is for work performed by Mr. Joseph for Paladin or for GTWR, or how Paladin is compensated, if at all, for having provided the services of Messrs Bates and O'Brien. In any case, there is no provision for payment for other independent contractors referred by Paladin to GTWR.

The services to be performed by the independent contractors "is expected to be "a final finished work product;" those contractors are characterized by Mr. Joseph as "independent persons supplying professional expertise." Mr. Bates was formerly Senior Director

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of Labor Relations for GTWR. Through Paladin he "now operates as an independent contractor providing consultation on labor issues, and provides professional analysis of, and recommendations on, labor agreements, but has no authority to implement them." The same description holds for Mr. Richard O'Brien.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(1)(a)(1)), insofar as relevant here, defines a covered employer as:

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with one or more employers as defined in paragraph (i) of this subdivision and which operates any equipment or facility or performs any service (other than trucking service, casual service, and the casual operation of equipment and facilities) in connection with the transportation of passengers or property by railroad *

* * .

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

Paladin clearly is not a carrier by rail. Further, the available evidence indicates that it is not under common ownership with any rail carrier nor controlled by officers or directors who control a railroad. Therefore, Paladin is not a covered employer under the Acts.

This conclusion leaves open, however, the question whether the persons who perform work for Paladin under its arrangements with GTWR should be considered to be employees of GTWR rather than of Paladin. Section 1(b) of the Railroad Retirement Act and section 1(d) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation. Section 1(d)(1) of the RRA further defines an individual as "in the service of an employer" when:

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(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and

(ii) he renders such service for compensation * *

* .

Section 1(e) of the RUIA contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the RRTA (26 U.S.C. §§ 3231(b) and (d)).

The focus of the test under paragraph (A) is whether the individual performing the service is subject to the control of the service-recipient not only with respect to the outcome of his work but also the way he performs such work.

The evidence submitted shows that the work is not performed under the direction of GTWR; accordingly, the control test in paragraph (A) is not met. The tests set forth under paragraphs (B) and (C) go beyond the test contained in paragraph (A) and would hold an individual a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. Under an Eighth Circuit decision consistently followed by the Board, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business.

See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953).

Thus, under Kelm the question remaining to be answered is whether Paladin is an independent contractor. Courts have faced similar considerations when determining the independence of a contractor for purposes of liability of a company to withhold income taxes under the Internal Revenue Code (26 U.S.C. § 3401(c)). In these cases, the courts have noted such factors as whether the contractor has a significant investment in facilities and whether the contractor has any opportunity for profit or loss; e.g., Aparacor, Inc. v. United States, 556 F. 2d 1004 (Ct. Cl., 1977), at 1012; and whether the contractor engages in a recognized

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trade; e.g., Lanigan Storage & Van Co. v. United States, 389 F. 2d 337 (6th Cir., 1968, at 341.

The evidence in this case shows that Paladin is in business as a general contractor; that it will shortly enter into an agreement with Empco, an employee leasing company based in Troy, Michigan; that Paladin is also finalizing an arrangement with Brass Forgings, Inc., a brass manufacturer in Ferndale, Michigan, for the provision of safety expertise through independent contractors; and that Paladin is currently negotiating with another new client, a major U.S. rail carrier unrelated to GTWR, for the provision of safety expertise through independent contractors. A majority of the Board finds that the evidence demonstrates that Paladin is an independent business within the Kelm decision.

It is therefore the decision of a majority of the Board that the individuals performing service for GTWR pursuant to the agreement between GTWR and Paladin are not employees of GTWR, and that that service is therefore not covered under the Acts.

Glen L. Bower

V. M. Speakman, Jr.

(Dissenting)

Jerome F. Kever

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paladin.cov
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Paladin Strategies, Ltd.

3 September 1996

Steve -

There is very little information available as to what the individuals actually do. We could send the assignment back for more information if you think that this draft is insufficient.

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17 October 1996

Steve -

As I mentioned in my note of September 3rd, there is little information as to what the individuals involved do. I have revised the decision to state essentially that the integration conclusion is based on an inference (I have highlighted the change, which is on the second to the last page). If you think we need additional

evidence, then we have to send the assignment back for further investigation.

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Paladin Strategies, Ltd.

TO : The Board

FROM : Catherine C. Cook
General Counsel

SUBJECT: Paladin Strategies, Ltd.
Coverage Determination

Attached is a coverage determination which has been revised to conclude that a majority of the Board, the Labor Member dissenting, finds that employees of Paladin Strategies, Ltd. are not performing services covered by the Railroad Retirement and Railroad Unemployment Insurance Acts.

Attachment

Paladin Strategies, Ltd.